No. [redacted]12

In the Supreme Court of the United States

OCTOBER TERM, 1920.

LOUIS H. EBERLEIN, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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v.
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STATEMENT.

The material facts in this case can be stated briefly. Appellant entered the Government service as an assistant weigher and in March, 1909, was promoted to the position of storekeeper at $1,400 per annum. Later, on January 10, 1910, his salary was increased to $1,600 per annum. (R. Finding II, p. 4.)

On May 9, 1910, he was suspended from duty and pay pending an investigation of charges preferred against him. Appellant was afforded three days for answer, and after he had filed a sworn answer was removed by the Secretary of the Treasury on May 26, 1910, strictly in compliance with civil service rules then in force. (R. Finding III, p. 5.)

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In 1912 he succeeded in presenting his case to the Attorney General, who came to the conclusion that appellant had been unjustly accused of complicity in underweighing frauds in connection with the importation of sugar. (R. Finding V, p. 5.)

No action was taken until October, 1912, when the matter having been brought to the attention of President Taft, the President issued the Executive order set out in the findings, reinstating appellant "to any appropriate classified position in the customs service at New York without regard to the length of time" he was separated from the service. (R. Finding V, p. 5.)

ARGUMENT.

APPELLANT WAS EFFECTIVELY REMOVED FROM THE GOVERNMENT SERVICE ON MAY 26, 1910, AND THE EXECUTIVE ORDER OF THE PRESIDENT DID NOT RETROACTIVELY RESTORE HIM TO HIS OFFICE AS OF THE DATE OF HIS REMOVAL.

The findings show that appellant was removed from his position as storekeeper on May 26, 1910, by the Secretary of the Treasury upon the recommendation of the collector. Since the rules and regulations concerning removal were complied with and since the removal was made by the appointing authority, appellant was effectively removed from office. (*Burnap* v. *United States*, 252 U. S. 512, and cases cited at p. 515.) See also Customs Regulations, 1908, articles 1370 and 1371, under title "Appointments." The courts will not review the Secretary's decision. (*Keim* v. *United States*, 177 U. S. 290.)

But the tenor of appellant's argument is that, conceding the courts would not have reviewed the decision of the Secretary of the Treasury in removing him on May 26, 1910, still the President subsequently found that he was not guilty of the acts of which he had been charged, and reinstated him. Therefore it is argued that the original removal was not for "just cause," as provided in Customs Regulations, article 1385 (1908), and was no removal; and second, that the act of the President in reinstating him was retroactive, and amounted to an appointment as of the date of his removal. Consequently, it is contended that his salary for the period follows as an incident to his office. The position is untenable.

The entire argument is based on the premise that the President is the appointing power. Congress has expressly delegated the power of appointment of subordinate customs officers and employees to the Secretary of the Treasury (R. S. 2621, Comp. State. 1916, sec. 5359; act Feb. 6, 1907, c 471, 34 Stat. 880, Comp. Stat., sec. 5369; Customs Regulations, 1908, articles 1370 and 1371). The Constitution (Art II, sec. 2) authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law, or in the heads of departments. (*Burnap* v. *United States*, 252 U. S. 512–514.) An original appointment or a reappointment of appellant by the President would then have been without authority of law.

It was said by Mr. Justice Thompson in *ex parte Hennen* (13 Peters, 135–139):

> In all of these departments (State, War, Treasury, and Navy) power is given to the Secretary to appoint all necessary clerks. (1 Story, 48.) And although no power to remove is expressly given, yet there can be no doubt that these clerks hold their office at the will and discretion of the head of the department. It would be a most extraordinary construction of the law, that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department; *the President has certainly no power to remove.*

The only portion of the President's order material to a decision of the case is the following:

> Mr. Louis H. Eberlien may be reinstated to any appropriate classified position in the customs service at New York without regard to the length of time he has been separated from the service.

To argue that the word " reinstate " means to reappoint appellant as of the date of his removal or at any date is to construe the Executive order as an attempt on the President's part to make an appointment which he was without authority in law to make. (*Burnap* v. *The United States, supra; United States* v. *Mouat*, 124 U. S. 303.) The findings do not show who, if anybody, reappointed appellant to a new position in the

customs service, although the opinion in the court below says he was "reinstated" by the collector. But if he resumed a position in the customs service by virtue of this presidential order, he was a *de facto* officer only, unless by acquiescence on the part of the Secretary of the Treasury his reappointment became *de jure*.

It seems clear from the foregoing that appellant, having been legally and effectually removed from the service on May 26, 1910, ceased to be an officer and that no salary was due him as incident to his office. It is also shown that the President had no power of appointment and therefore no consequential power of removal. So, even when the President concluded that appellant had been removed on charges of which he was not guilty, he had no more power than the courts would have to declare the removal void or to reappoint the officer, where the Secretary, in removing the officer, complied with all statutory provisions. (*Keim* v. *United States*, 177 U. S. 290.)

But the letter of the President was not a vain thing. It is found as a fact that appellant was in the classified civil service. The law provides (R. S. 1753, Comp. Stat. 1918, sec. 3213):

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof. * * *.

By the act of January 16, 1883, chap. 27 (22 Stat. 403), Comp. Stat. 1918, sec. 3271 *et seq.* the Civil Service Commission was created to make regulations for open competitive examinations for classified positions. It was directed that after six months from the passage of the act no appointment should be made until after an examination (Comp. Stat. 1918, sec. 3278), but the provision was made subject to the power of the President to make regulations, not inconsistent with the act, according to R. S. 1753 *supra.*

Pursuant to these acts, civil-service Rule IX was promulgated. (Report Civil Service Commission, 1912–13, p. 80.)

> A person *separated* without delinquency or misconduct from a competitive position, or from a position which he entered by transfer or promotion from a competitive position, may be *reinstated* in the department or office in which he formerly served, upon certificate of the commission, subject to the following limitations:
>
> *a.* The *separation* must have occurred within one year next preceding the date of the requisition of the nominating or appointing officer for such certificate; * * *
>
> *b.* No person may be reinstated to a position requiring an examination different from that required for the position from which he was *separated.* * * *

The conclusion is therefore clear that when President Taft used the word "reinstate" it had a very definite meaning, and not the meaning which appellant accords it. In Rule IX *supra*, the word as used presupposes a *separation* from the service. A person separated from his position, then, "without delinquency or misconduct," could be appointed to a like position without the requirement of passing an examination, as required by the civil-service act. Since this Rule IX limits the period of reinstatement to one year, and since the President found that appellant had been removed without delinquency or misconduct, it required an Executive order, which the President clearly had power to issue, to make appellant eligible for appointment to a classified position after he had been separated from his position longer than that time.

Clearly this was the rule President Taft had in mind when the order was issued, for it is the only construction which can be placed on this language.

> Mr. Louis H. Eberlien may be reinstated to *any* appropriate *classified position* in the customs service at New York *without regard to the length of time he has been separated from the service.*

Since it is clear that appellant was legally separated from the service and that the Executive order had no further effect than to avoid the necessity of an examination to make him eligible for an appointment to any classified civil service

position in New York, it follows that appellant was not an officer of the Government during the period sued for, and consequently has no legal right to the salary of an office which he did not hold.

CONCLUSION.

It is therefore submitted that since appellant was removed from his position by the power who appointed him, and since the removal was strictly in compliance with civil-service rules, there can be no doubt that he was effectively separated from the service. Since the President did not have the power of appointment, he had no power in the premises other than to waive the civil-service rules concerning eligibility for appointment to a Federal position, governed by said rules, and to request the Secretary of the Treasury to appoint appellant to a position in the customs service. A construction of the President's letter shows he attempted to do nothing else. There is therefore no theory upon which the officer can recover for the period when he was out of the service and was neither an officer *de jure* nor *de facto*.

Respectfully submitted.

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FEBRUARY, 1921.

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